No. 91-135

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

ASSOCIATION OF AMERICAN MEDICAL COLLEGES,

Petitioner,

against

MARIO CUOMO, Ind., and as Governor of the State of New York; THEODORE M. BLACK, Ind., and as Chancellor, Board of Regents of the University of the State of New York; WILLARD A. GENRICH, Ind., and as Vice Chancellor, Board of Regents of the University of the State of New York; KENNETH B. CLARK, HAROLD E. NEWCOMB, EMLYN I. GRIFFITH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUIS E. YAVNER, LAURA BRADLEY CHODOS, MARTIN C. BARELL, JOSEPH R. BONGIORNO, LOUISE P. MATTEONI, J. EDWARD MEYER, ARLENE B. REED-DELANEY, R. CARLOS CARBALLADA, Ind., and as Members of the Board of Regents of the University of the State of New York; GORDON M. AMBACH, Ind., and as Commissioner of Education, the University of the State of New York; and ROBERT ABRAMS, Ind., and as Attorney General,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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(1277—LC4-224)

Counterstatement of Question Presented

Whether, in view of the fact that every circuit court to have considered the question agrees that the caption of a notice of appeal may be consulted in determining the adequacy of a notice of appeal under Fed. R. App. P. (3)(c) to "specify the party or parties taking the appeal," and that six of the seven courts to address the subject have held that an appeal survives at least as to a party named in the caption when the body of the notice indicates only that "defendants [or "plaintiffs"] appeal," no review by this Court is called for where it is immaterial to this case whether the Notice of Appeal to the Court of Appeals preserved the appeal of all parties defendant in the District Court or only of the single defendant named in the caption.

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Respondents Mario Cuomo, Theodore M. Black, Willard A. Genrich, Kenneth B. Clark, Harold E. Newcomb, Emlyn I. Griffith, Mary Alice Kendall, Jorge L. Batista, Louis E. Yavner, Laura Bradley Chodos, Martin C. Barell, Joseph R. Bongiorno, Louise P. Matteoni, J. Edward Meyer, Arlene B. Reed-Delaney, R. Carlos Carballada, Gordon M. Ambach, and Robert Abrams respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Second Circuit's denial of petitioner's motion to dismiss the appeal in this case for failure to comply with Federal Rule of Appellate Procedure 3(c).

Statement of the Case

The Statement of the Case offered by petitioner is substantially accurate. It errs only in contending (Petition, p. 3) that the notice of appeal here "did not identify the specific defendants on whose behalf the notice was being filed, either by name or in any other manner." Defendant Mario Cuomo was named in the caption of the notice of appeal, and, as the Second Circuit squarely held, the notice was "sufficiently precise to fulfill the specificity requirement" of Fed. R. App. P. 3(c) with regard to both Mario Cuomo and all other defendants.

REASONS FOR DENYING THE WRIT

There is no significant conflict among the Courts of Appeal in this case, for six of the seven Courts to have decided the central issue here would reach the same result as the Court below.

For the purposes of the present case, there is no conflict, direct or otherwise, between the holding below and decisions in other circuits. Six of the seven circuits to have considered the question presented here would have permit-

ted the appeal to go forward as it did. Only the Seventh Circuit, whose approach to Fed. R. App. P. 3(c) has been repudiated by other circuits and adopted by none, might have dismissed the appeal. The aberrant position of a single court on this issue has twice been insufficient to induce this Court to grant a petition for certiorari. There is no reason to rule otherwise now.

The Second Circuit correctly concluded that "the phrase 'the defendants in the above matter hereby appeal' was the functional equivalent of naming each and every defendant in this action." As this Court has recently reaffirmed, "the requirements of the rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (quoting *Foman v. Davis*, 371 U.S. 178, 181 [1962]). Simple common sense and semantics indicate that the reference in the notice of appeal to "the defendants" must mean "all the defendants." There is nothing else it can possibly mean. The term cannot signify "some of the defendants" or anything but each and every one of them. The Second Circuit, by recognizing this fact, aligned itself with the Ninth Circuit, which in *National Center for Immigrants Rights, Inc. v. Immigration & Naturalization Service*, 892 F2d 814 (9th Cir. 1989) ("NCIR") considered the adequacy of a notice of appeal whose caption named "National Center for Immigrants' Rights, Inc., *et al.*", and whose body stated "that defendants in the above-referenced action hereby appeal . . ." 892 F.2d at 815. To the Ninth Circuit, "[d]efendants, in its normal usage, means all defendants not just some. If only *some* defendants intended to appeal, the proper term to be used in the body of the notice would have been 'certain defendants.' " 892 F.2d at 816-17 (emphasis in original). This construction of a notice of appeal is both liberal and logical, as it must be.

Several other circuit courts take a slightly different approach to this issue, one that in this case would have led to the identical result. The First, Fifth, Sixth and Tenth Circuits all require that an appellant be named somewhere on the face of the notice of appeal, either in the caption or the body of the document. Thus, when confronted with a notice of appeal whose caption names a party or parties followed by "*et al.*" and whose body states only that "plaintiffs [or "defendants"] appeal," these courts have permitted the appeal of the party or parties named in the caption to go forward. *See Samaad v. City of Dallas,* 922 F.2d 216, 219-20 (5th Cir. 1991); *Laidley v. McClain,* 914 F.2d 1386, 1389 (10th Cir. 1990); *Minority Employees of Tennessee Dep. of Employment Security, Inc. v. State of Tennessee Dept. of Employment Security,* 901 F.2d 1327, 1335 (6th Cir.), *cert. denied sub nom. Davis v. Tennessee Dept. of Employment Security,* 111 S.Ct. 210 (1990); *Mariani-Giron v. Acevedo-Ruiz,* 877 F.2d 1114, 1116 (1st Cir. 1989). The approach embodied in these cases would, if employed in the present case, have permitted the appeal of Mario Cuomo, who is named in the caption, to survive.

Although it is possible to envision cases in which it will matter which plaintiff or defendant among many gets to pursue an appeal, this is not such a case. Plaintiff in this action sought declaratory and injunctive relief, claiming that certain New York statutes violated and conflicted with federal law, and naming as defendants a group of state officials, including Governor Cuomo, whom the complaint identifies as responsible for "administering" or "enforcing" the statutes in question. The Attorney General represents all these defendants, and a declaration of the invalidity of the statutes in question will prevent each of them from enforcing these statutes, regardless of who is or is not named as a defendant. The outcome of this case on its merits will be the same if only Governor Cuomo is a

defendant in the district court and does not depend on whether Mario Cuomo alone or Mario Cuomo and all other defendants take the appeal.

The common-sense approach to this case taken by the Second and Ninth Circuits is plainly correct, especially in light of this Court's exhortation to ignore "technicalities" in favor of a liberal construction of procedural rules. Petitioner has not dared to suggest that it was in any way misled or confused by the notice of appeal. But the slightly divergent approach of four other courts, under which Mario Cuomo would remain as an appellant, would, on the facts presented here, yield the same result reached by the court below. The supposed "conflict" between these two approaches, upon which petitioner bases its argument in support of granting the writ, is in this case abstract and academic, and thus not worthy of this Court's review.

It is true that the Seventh Circuit, alone among the courts of appeal, has held that naming a single party "*et al.*" in the caption of a notice of appeal is insufficient if the body of the notice indicates only that "the plaintiffs are appealing." *See Pride v. Venango River Corp.*, 916 F.2d 1250, 1251 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1696 (1991). Even the Seventh Circuit, however, contrary to petitioner's claim (Petition, p. 7), has declined to adopt "a blanket rule that we always ignore the caption in deciding whether the notice of appeal is adequate." *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 423 (1990). Moreover, this Court declined to review *Pride*, even though the purportedly conflicting decisions in *NCIR* and *Minority Employees*, among others, were extant at the time certiorari was denied. Similarly, the petition for certiorari in *Minority Employees* was not granted, even though (according to the present petitioner) it was in conflict with the decision in *NCIR* and dictum from the Seventh Circuit unmistakably

adumbrating the decision in *Pride*. *See Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988). Perhaps this is because this Court recognizes that clarification of Rule 3(c) is an Administrative job, not a judicial one. And indeed, an amendment clarifying the rule has been proposed to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

Nothing has changed in the four months since this Court denied the petition in *Pride*. The Seventh Circuit presumably continues to hew to its mistaken course, while the other six courts of appeal to consider the issue would all find that the notice of appeal in the present case satisfies the specificity requirement of Fed. R. App. P. 3(c). The "conflict" detected by petitioner is in fact virtually nonexistent and has at least twice before failed to induce this Court to supply an unnecessary "resolution." There is no need to supply one now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
August , 1991.

Respectfully submitted,

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